

No. 20278

In the

United States Court of Appeals  
For the Ninth Circuit

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ELIZABETH G. HERSCHEL, as  
surviving spouse of CHARLES F.  
HERSCHEL, deceased, and as surviving  
mother of WAYNE ANDREW  
HERSCHEL, deceased; and BRUCE  
E. KIERNAN,

*Appellants,*

vs.

MARY ELIZABETH SMITH,  
Administratrix of the Estate of  
NATHANIEL EAKINS, deceased,

*Appellee*

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Appeal from the United States District Court  
for the District of Arizona

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Appellee's Brief

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**PREFATORY NOTE**

Appellee will, as have appellants, designate the parties as plaintiffs and defendant, as they were in the Trial Court. "T.R." designates Transcript of Record, and "A.O.B." designates Appellants' Opening Brief. "A.B." designates Appellee's Brief.

## **JURISDICTION**

Diversity of citizenship is present between parties. An amount in excess of \$10,000.00 exclusive of interest and costs is in controversy. However, the trial court had no actual jurisdiction over the person of the non-resident defendant administratrix, as set forth in the Argument.

## **STATEMENT OF THE CASE**

Plaintiffs' statement of the cases goes beyond the record in regard to matters concerning the occurrence of the accident which precipitated the action below. (A.O.B. 2).

Plaintiffs were occupants of an automobile which collided with an automobile operated by one Marva White Curtis. It is alleged she was operating her automobile as an agent of Nathaniel Eakins. The accident occurred June 23, 1962, on a public highway in northern Arizona. Nathaniel Eakins, together with others, died. (Plaintiffs' Amended Complaint. T.R. 7-13).

Thereafter on July 2, 1962, the Probate Court of Hamilton County, Ohio, appointed Mary Elizabeth Smith the Administratrix of the Estate of Nathaniel Eakins, deceased. (Plaintiffs' Amended Complaint. T.R. 7).

Thereafter, on June 22, 1964, plaintiffs filed suit in the United States District Court, District of Arizona.

Plaintiffs attempted to effect a valid service of process upon Administratrix Mary Elizabeth Smith by means of registered mail, and went through the mechanical steps of Rule 4(e) (2) Arizona Rules of Civil Procedure, as described in their Opening Brief (A.O.B. 3).

Defendant Mary Elizabeth Smith's Motion to Dismiss was filed March 24, 1965 (T.R. 20 and 51), and the Court, following oral argument, granted that Motion and ordered the

Complaint dismissed as to this defendant (T.R. 37-38). On June 9, 1965, the Court, on stipulation of counsel, entered its Amended Judgment granting defendant Mary Elizabeth Smith's Motion to Dismiss the complaint as to her as Administratrix of the Estate of Nathaniel Eakins, deceased, and specifying its decision was based upon the sole ground "— that this court lacks jurisdiction over the person of said defendant for the reason that no valid service of Summons and Complaint upon said defendant has been effected." (T.R. 41-42).

The further procedural steps described in plaintiffs' Brief (last paragraph A.O.B. 3) ensued.

### QUESTION PRESENTED

The sole question before the Court is whether utilization of Rule 4(e) (2) of Arizona Rules of Civil Procedure provides a valid means of service upon a non-resident personal representative to confer jurisdiction over such defendant upon the United States District Court of Arizona where the appointment was subsequent to the occurrence referred to in the Rule.

### ARGUMENT

Plaintiffs' argument (A.O.B. 4-6) contends ultimately only for service under Rule 4(e) (2) Arizona Rules of Civil Procedure (Complete text Appendix i).

Defendant does not dispute the argument of plaintiffs. It is a mere recital of plaintiffs' mechanical steps and does not reach the question.

*1. The Statute provides the exclusive means of service of process upon non-resident motor vehicle operator or owner defendants.*

Long prior to the occurrence involved here, Arizona Revised Statutes 28-502, and 28-503 (complete text Appendix iv and v) provided a means for out of State service of process

upon non-resident motor vehicle operators and owners whose vehicles are used on Arizona highways. The statutes make the use of such vehicle on State highways an automatic appointment of the Superintendent of Motor Vehicles as the operator and owner's attorney for service of process. No provision is made therein to require such appointment be irrevocable or to be equally binding upon the personal representative of such non-resident operator or owner. These statutes spell out the exclusive means of service upon such non-resident operators and owners. *BROWN v. HUGHES*, 136 F. Supp. 55, 59-60.

*(a) Death of non-resident motor vehicle operator or owner revokes appointment of attorney for service of process.*

It has been consistently held that under such statutes the appointment terminates with the death of the operator or owner and such statutes do not apply to personal representatives of such decedents. 8 AM.JUR.2d 417, Sec. 861; 53 ALR 2d 1194, Sec. 14; *NATIONAL UNION FIRE INS. CO. of PITTSBURGH, PA. vs. PETRO*, 189 F. Supp. 651; *HENDRICKS v. JENKINS*, 120 F. Supp. 879, *FAZIO v. AMERICAN AUTO INSURANCE CO.*, 136 F. Supp. 184; *BROWN v. HUGHES*, 136 F. Supp. 55. These last three cases succinctly point out that such statutes are in derogation of the common law and must be strictly construed. Substantively the law of Arizona does not permit out of State service of process upon personal representatives of such owners or operators.

*2. Rules of Procedure do not permit service of valid process upon a non-resident personal representative.*

Rule 4 (e) of Federal Rules of Civil Procedure (complete text Appendix iii) permits the District Court to utilize a rule of the State Court to acquire service upon a non-inhabitant of the State in which the District is located. Such utilization is



to be made "——under the circumstances and in the manner prescribed in the Statute or Rule."

Rule 4 (e) (2) of Arizona Rules of Civil Procedure (Appendix i) provides for personal service out of the State upon a "person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this State out of which the claim which is the subject of the complaint arose ——".

The event which occurred was the accident of June 23, 1962 (T.R. 8). Defendant Smith was appointed Administratrix July 2, 1962 (T. R. 7). It is not contended, nor could she have caused the event to occur some nine days earlier. The rule clearly cannot be applied to her to effect a valid service.

The Arizona rule specifically enumerates the persons and entities that fall within its purview. It is significant it does not specify a personal representative as one of those upon whom it operates. The HENDRICKS, FAZIO and BROWN cases, *supra*, point out the requirement of strict construction of a statute in derogation of the common law. If the District Court acquires jurisdiction over the defendant it must do so through enabling Rule 4(e) Federal Rules of Procedure. That rule includes "statutes" and "rules" within the same category. No basis for distinction can be found for permitting or requiring a procedural rule, as Arizona's, to be construed in a different manner from a statute when that rule is in derogation of the common law. Thus the plaintiffs' attempted service was not made in the manner prescribed in the State rule as is required by Federal Rule of Procedure 4(e).

While Rule 4(e) (2) Arizona Rules of Civil Procedure has been held valid as relating to procedural matters, and permitting service upon a foreign corporation which came into the state, such corporation was a creature specifically recognized by the rule. *HEAT PUMP EQUIPMENT CO. v. GLEN*

ALDEN CORPORATION, 93 Ariz. 361, 380 P. 2d 1016. Such a procedural rule cannot create or nullify the substantive law of the State.

3. *Plaintiffs recognized the lack of means of valid service upon non-resident personal representatives.*

Plaintiffs' attempt at service upon defendant Smith by utilization of Rule 4(e) (2) Arizona Rules of Procedure rather than Arizona Revised Statutes Sec. 28-502 and 28-503 is tacit acceptance of the impossibility of acquiring valid service thereunder. We cannot understand why they were not equally realistic concerning Rule 4(e) (2) and did not bring their action in the unquestioned jurisdiction of Courts in the State or District in which the Administratrix was appointed.

### CONCLUSION

Defendant Administratrix does not fall within the scope of Arizona Rules of Civil Procedure, Rule 4(e) (2) either on its face or by indirection. We submit the only interpretation possible is the one reached by Judge Muecke, that the Court lacked jurisdiction over the person of the defendant for the reason no valid service of the Summons and Complaint upon the defendant has been effected.

We submit the question presented should be answered in the negative and the judgment of the United States District Court be affirmed.

Respectfully submitted,  
GUST, ROSENFELD & DIVELBESS  
By: JAMES F. HENDERSON  
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing Brief is in full compliance with those Rules.

JAMES F. HENDERSON  
Attorney for Appellee

## *Appendix*

### **RULES OF CIVIL PROCEDURE Rule 4(e)**

4(e) (2) Summons; personal service out of state. When the defendant is a resident of this state, or is a corporation doing business in this state, or is a person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state. In case of a corporation or partnership or unincorporated association, service under this Rule shall be made on one of the persons specified in Section 4(d) (6).

(a) Registered mail. When the whereabouts of a defendant outside the state is known, the serving party may deposit a copy of the summons and complaint in the post office, registering it with a return receipt requested. Upon return through the post office of the registry receipt, he shall file an affidavit with the court showing the circumstances warranting the utilization of the procedure authorized under Section 4(e) and (a) that a copy of the summons and complaint was dispatched to the party being served; (b) that it was in fact received by the party as evidenced by the attached registry receipt; (c) that the genuine receipt thereof is attached; and (d) the date of the return thereof to the sender. This affidavit shall be prima facie evidence of personal service of the summons and complaint and service shall be deemed complete and time shall begin to run for the purposes of Section 4(e) (4) of this Rule thirty (30) days after the filing of the affidavit and receipt.

(b) Direct service. Service out of the state may also be made in the same manner provided in Section 4(d) of this Rule by a person authorized to serve process under the law of the state where such service is made. Service shall be complete

## *Appendix*

when made and time for purposes of Rule 4(e) (4) shall begin to run at that time, provided that before any default may be had on such service, there shall be filed an affidavit of service showing the circumstances warranting the utilization of the procedure under Section 4 (e) (1) and attaching an affidavit of the process server showing the fact of the service. Amended July 14, 1961. Effective on and after midnight Oct. 31, 1961.

## *Appendix*

### **RULE 4. PROCESS**

(e) Same. Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

## *Appendix*

### **Sec. 28-502. Appointment by nonresident of attorney upon whom to serve process.**

A. The rights and privileges conferred by Sec. 28-501 and paragraphs 3, 4 and 5 of Sec. 28-412, shall be deemed accepted, and such acceptance evidenced, by a nonresident:

1. When the nonresident, by himself or his agent, operates a motor vehicle on a public highway in this state under the provisions of and the conditions imposed by such sections.

2. When the nonresident, by himself or his agent, operates a motor vehicle on a public highway in this state otherwise than under the provisions of such section.

3. When a motor vehicle owned by a nonresident, is operated on a public highway in this state with his express or implied permission under such circumstances as would render a resident motor vehicle owner liable for damages to person or property caused by such operation.

B. The acceptance of the rights and privileges set forth in sub-section A of this section shall be deemed to constitute and be the appointment of the vehicle superintendent by the nonresident as his true and lawful attorney upon whom may be served all legal process in an action against such nonresident growing out of any accident or collision in which the nonresident, his agent or other person operating a motor vehicle owned by him with his express or implied permission on a public highway in this state, is involved.

C. The provisions of this section shall also apply to a nonresident defendant who was a resident of the state at the time of the accident or occurrence which gave rise to the action.

## *Appendix*

### **Sec. 28-503. Service on vehicle superintendent and notice to nonresident; proof of service.**

A. Service of process under Sec. 28-502 shall be made by leaving a copy of the summons and complaint and a fee of two dollars with the vehicle superintendent, or in his office during office hours and shall be deemed sufficient service upon the nonresident if either of the following are complied with:

1. The plaintiff forthwith sends notice of such service and a copy of the summons and complaint by registered mail to the nonresident defendant, appends defendant's return receipt and plaintiff's affidavit of compliance with this section and Sec. 28-502 to the original summons and files them with the court within such time as the court allows.

2. The plaintiff serves notice of such service and a copy of the summons and complaint upon defendant, if found without the state, by a duly constituted officer qualified to serve like process in the state or the jurisdiction where defendant is found, and files with the court within such time as the court allows, the officer's return showing that the notice, copy of the summons and complaint were served as provided by this section upon defendant.

B. The court in which the action is pending may order postponements necessary to afford defendant reasonable opportunity to defend the action.

C. The superintendent shall keep a record, which shall include the day and hour of service, of all process served upon him under this section.

D. The fee paid to the superintendent at the time of service shall be taxed as costs in the suit if plaintiff recovers.

